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No. 04-12

In the Supreme Court of the United States

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AND THE ARIZONA CORPORATION COMMISSION,
Petitioners,
v
UNITED STATES TELECOM ASSOCIATION, *ET AL.*,
Respondents.

On Petition For Writ of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

RESPONSE OF MICHIGAN PUBLIC SERVICE COMMISSION SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether, in administering a statute that is an exercise in cooperative federalism, a federal agency is barred from asking States to make additional determinations in accord with substantial guidance provided by the agency where that Act (§ 251(d)(3)) expressly reserves to States authority to make independent unbundling determinations.

2. Alternatively, assuming the Court was correct in its "subdelegation" analysis, whether *vacatur* was proper given that *Congress* has expressly and directly delegated to States the authority to make unbundling decisions.

PARTIES TO THE PROCEEDING

Petitioners are the National Association of Regulatory Utility Commissioners (NARUC), a quasi-governmental corporation organized under the laws of the District of Columbia with its principle place of business in Washington, D.C., and the Arizona Corporation Commission, a State governmental entity.

Respondent here is the Michigan Public Service Commission, a state regulatory commission.

Other parties to the District of Columbia Circuit proceeding are identified in the caption of the decision below. (See App. B66a *et seq.*)[1]

[1] NARUC/Arizona, in their petition, cited to the appendices filed by AT&T *et al* in Docket No. 04-15 seeking review of the same D.C. Circuit decision. Accordingly, all appendix cites in this response are to the appendix filed by AT&T *et al* in No. 04-15.

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OPINIONS BELOW

The opinion of the court of appeals (App. A-1a *et seq*) is reported in *United States Telecom Ass'n v FCC*, 359 F3d 554, 594 (DC Cir, 2004) (*USTA II*). The Federal Communications Commission's order (App. B-66a *et seq*) is reported at 18 FCC Rcd 16,978, and an *Errata* correcting the order is reported at 18 FCC Rcd 19,020.

JURISDICTION

The court of appeals opinion and judgment were issued on March 2, 2004. This Court has jurisdiction under 28 USC 1254(1).

STATUTORY PROVISIONS INVOLVED

Statutory provisions are from the Telecommunications Act of 1996, Pub L 104-104, 110 Stat 56, and are reproduced at App. C-1036a *et seq*.

STATEMENT OF THE CASE

With the enactment of the Telecommunications Act of 1996, 47 USC 151 *et seq* (FTA or Act) Congress moved toward a national policy of competition in the telephone market, enacting a statutory scheme that provides a role for both the Federal Communications Commission and State regulators. The 1996 Act is "an exercise in what has been termed cooperative federalism." *Puerto Rico Tel Co v Telecom Reg Bd of Puerto Rico*, 189 F3d 1, 8 (1st Cir, 1999). It required the FCC to work together with State agencies to open local markets to competition. *See, e.g., Verizon Communications Inc v Law Offices of Curtis V. Trinko, LLP*, 540 US ___; 124 S Ct 872, 876, 882 (2004) (discussing specific examples of the FCC and State commissions working cooperatively to implement the pro-competitive goals of the 1996 Act). The 1996 Act has generated numerous challenges to the manner in which its provisions are implemented. Notwithstanding a perceived lack of clarity in the Act on crucial provisions, this Court has nonetheless confined its enforcement to

the "clear limits" of the 1996 Act, acknowledging that Congress was "well aware" of the ambiguities it chose to produce in the 1996 Act. As this Court concluded in *AT&T Corp v Iowa Utilities Bd,* 525 US 366, 397 (1999):

> It would be gross understatement to say that the 1996 Act is not a model of clarity. It is in many important respects a [model of ambiguity] or indeed even [self-contradiction]. That is mot unfortunate for a piece of legislation that profoundly affects a crucial segment of the economy worth tens of billions of dollars. The 1996 Act can be read to grant (borrowing a phrase from incumbent GTE) "most promiscuous rights" to the FCC vis-à-vis the state commissions and to competing carriers vis-à-vis the incumbents – and the Commission has chosen in some instances to read it that way. **But Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency, see *Chevron*, 467 U.S. at 842-843. We can only enforce the clear limits that the 1996 Act contains**, which in the present cases invalidate only Rule 319. [Emphasis added.]

A key provision of the Act is 47 USC 251(c)(3) which requires the "unbundling," or sharing, of the incumbent's network facilities, or "elements." App. C-1039a. That provision adopts the rules already in place in many States to bring competition to local markets by requiring sharing of network infrastructure. It also requires that both the FCC and State regulators implement the Act's unbundling regime.

§ 251(d) of the Act (App. C-1041a) govern implementation, including the unbundling requirements specified in § 251(c). (App. C-1038a). Congress generally did not require the FCC to issue regulations implementing any specific subsection of § 251's market-opening provisions. It did, however, require the FCC to "complete all actions necessary to establish regulations to implement the requirements of [§ 251]" within six months. 47

USC 251(d)(1); App. C-1041a. By requiring the FCC to "complete all actions *necessary* to establish regulations," rather than requiring the FCC to "complete *all* regulations," Congress appropriately contemplated a regime in which the FCC would share regulatory responsibilities. Congress also required that, in those circumstances where the FCC did set "access standards" to "determine[] what network elements should be made available" under the Act's leasing provision, it "shall consider, at a minimum, whether" competitors would be "impaired" without access to the incumbents' non-proprietary facilities. § 251(d)(2); App. C-1041a.

Congress also expressly preserves State local competition law, specifically providing that the FCC "*shall not preclude* the enforcement of any regulation, order, or policy of a State commission" that establishes unbundling obligations of local carriers, is consistent with the requirements of § 251, and "does not substantially prevent implementation of the requirements of this section and the purposes of this part." 47 USC 251(d)(3) (emphasis added). (App. C-1041a).

Moreover, under the Act it is the States, not the FCC, that are generally the arbiters of the terms that govern inter-carrier relationships. The terms of the ILECs' leasing arrangements with its competitors are set through voluntary negotiations. § 252(a)(1); App. C-1046a. If those negotiations fail, Congress designated State commissions, not the FCC, in the first instance to set the actual interconnection agreement terms that govern the leasing required by federal and State law. § 252(b); App. C-1047a. In setting those terms, State commissions are required to follow FCC regulations to the extent they govern resolution of a disputed matter. *See* 47 USC 252(c)(1); (App. C-1049a); 252(e)(2)(B); (App. C-1051a); *AT&T Corp v Iowa Utilities Bd*, 525 US 366, 385, n 10 (1999). To the extent the disputed matter is not subject to any FCC rule, however, the States apply the unbundling and other requirements of the Act itself, as well as their own law, to the extent that they are consistent with the purposes underlying the Act. State commissions, "guided by the

provisions of the Act and by the concomitant FCC regulations," are directed under the federal scheme to "exercise their expertise concerning the needs of the local market and local consumers." *Puerto Rico Tel Co*, 189 F3d at 14. *See, e.g.*, 47 USC 252(e)(3); (App. C-1052a); 253(b) (App. C-1055a); 261(b)-(c) (App. C-1057a); § 152 note (Pub L 104-104, § 601(c)).

The FCC unbundling regulations at issue here were the result of the FCC efforts to comply with the court of appeals' mandate in *United States Telecom Ass'n v FCC*, 290 F3d 415, 421-28 (DC Cir, 2002) ("*USTA I*"), *cert den* 538 US 940 (2003). According to the court, the FCC's nationwide rules were not carefully-enough calibrated to assure that unbundling would occur only in the specific locations in which there was an administrative record supporting a finding of impairment. *USTA I*, 290 F3d at 422-26. The court criticized the FCC for not adopting a rigorous definition of impairment. *Id* at 426-28.

In the decision below, the D.C. Circuit once again vacated the FCC's unbundling regime. *USTA II, supra*. The court did not limit itself to the FCC's impairment standard. Instead, it concluded that the FCC's "subdelegation" of unbundling authority to the States was unlawful. It reasoned that, even in the context of longstanding regulations implementing a scheme of cooperative federalism, "federal agency officials . . . may not subdelegate to outside entities — private or sovereign — absent affirmative evidence of authority to do so." *Id* at 566; App. A-12a. It directed the FCC to adopt new unbundling rules in which it, alone, would make the impairment analysis that the D.C. Circuit had required in *USTA I*. *Id* at 568-75.

The court *vacated*, rather than remanded, the FCC's unbundling rules, *Id* at 595-95, asserting that this extreme remedy was necessary in light of the FCC's "apparent unwillingness to adhere to prior judicial rulings." *Id* at 595. The industry has thus been thrown into a state of extreme uncertainty, and the competitive telecommunications environment States have worked for almost a decade to create is in jeopardy.

Pursuant to U.S. Supreme Court Rule 12.6, the Michigan Public Service Commission files this response supporting the Petitioners. This Court should grant certiorari and reverse the decision below because that decision conflicts with decisions of this Court and other courts of appeals, because it effectively disables critical provisions of an "unusually important legislative enactment," *Reno v ACLU*, 521 US 844, 857 (1997), the Telecommunications Act of 1996, and the scheme of "cooperative federalism" that is the cornerstone of the 1996 Act.

REASONS FOR GRANTING THE WRIT

In the decision below, the D.C. Circuit vacated portions of the FCC's *Triennial Review Order* ("*TRO*")[2] requiring incumbent local exchange carriers (ILECs) to share components of their local networks with competitors, and establishing extensive federal standards to guide State commissions in determinations of which unbundled network components do *not* have to be shared. The lower court found that States can play no role in these determinations, and that the FCC's findings are inadequate standing alone. This D.C. Circuit decision jeopardizes competition in the local exchange market that has developed over the last decade. During this time, State commissions have expended considerable time and resources to introduce, maintain and encourage competitive markets. Although States have significantly assisted in bringing competition to local markets, the Court's decision effectively limits the States' future ability to play a meaningful role in the move toward competition. The FCC is ill-equipped to fully implement the provisions of the 1996 Act without the States' assistance. The lower court decision effectively eliminates many of the Act's critical leasing provisions. It also flies in the face of the cooperative scheme established by the Act and the express authority given to States to make unbundling determinations.

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[2] *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCCR 16798 (2003), corrected by *Errata*, 18 FCCR 19020 (2003) ("*TRO*").

Certiorari should be granted because the court of appeals' holding significantly undermines the plan Congress enacted in the 1996 Act by eliminating any meaningful role for the States in what was intended to be an exercise of "cooperative federalism." It thus threatens the competitive environment State and federal regulators have worked for almost ten years to create. The Court of Appeals' decision is inconsistent with the Act itself, which, as this Court has explained, is intended to "'uproot' the incumbent LECs' monopoly and to introduce competition in its place." *Verizon Communications, Inc v Law Offices of Curtis, V. Trinko, supra* at 875 (quoting *Verizon Communications, Inc v FCC*, 535 US 467, 488 (2002)). This Court should grant certiorari and reverse.

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE LOWER COURT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEALS AND THREATENS THE PLAN FOR COOPERATIVE FEDERALISM EMBODIED IN THE FEDERAL TELECOMMUNICATIONS ACT OF 1996.

To comply with a previous ruling by the D.C. Circuit in *USTA I*, the FCC had delegated to state commissions the identification of "particular instances" when the FCC's finding of impairment regarding switching any transport was inapplicable. These State Commission determinations were to be based on precise principles provided by the FCC. The D.C. Circuit struck down the FCC's "delegation" to State commissions even though, as this Court has explained, the 1996 Act's local competition provisions create "a hybrid jurisdictional scheme" of federal-State partnership. *Verizon Communications, Inc v FCC, supra*, *see also AT&T Corp v Iowa Utilities Board, supra* at 378, n 6. That court held that "federal agency officials . . . may not subdelegate to outside entities – private or sovereign – absent affirmative evidence of authority to do so," even in the context of a regime of cooperative federalism such as that established in the 1996 Act.

USTA II, 359 F3d at 566. Such a holding squarely conflicts with decisions of this Court and of other courts of appeals and would impose a new limit on Congress' and federal agencies' ability to create cooperative arrangements with State regulators.

This Court, applying the deference articulated in *Chevron U.S.A., Inc v Natural Resources Defense Council, Inc, et al*, 467 US 837 (1984), has determined that federal agencies can exercise their rulemaking authority to "subdelegate" the determination of a federal issue to a State tribunal when the statute is one, like the 1996 Act, that is jointly administered by federal and State officials and that expressly gives States a role in making the same or similar determinations. The Court thus recognized in *Wisconsin Dep't of Health & Family Services v Blumer*, 534 US 473, 495 (2002), that, when dealing with statutes involving "cooperative federalism," the Court has "not been reluctant to leave a range of permissible choices to the States, at least where the superintending federal agency has concluded that such latitude is consistent with the statute's aims." The authority for such subdelegations is to be inferred from Congress's grant of "related" issues to States. *Id* at 495-97.

The 1996 Act is "an exercise in cooperative federalism." *Puerto Rico Tel Co v Telecomm Reg Bd*, 189 F3d at 8. The Act expressly assigns to the States the authority to arbitrate and approve interconnection agreements between incumbents and new entrants, and to approve general statements regarding interconnection that apply to all carriers within a State. The 1996 Act requires States to "arbitrate" all "open issues" between incumbents and competitors, and in doing so, "to ensure that such resolution . . . meet the requirements of Section 251, including the regulations prescribed by the Commission pursuant to Section 251." 47 USC 252(a)-(c), (e), (g); App. C-1046a –1049a, 1051a, 1054a.

Congress has thus expressly and directly delegated to States the authority to make unbundling decisions in arbitration proceedings whenever the FCC has been unable to make the

determination itself or has made a policy choice that States should apply the general unbundling standard to the particular local conditions in each State. Congress also preserved in the 1996 Act the State's historical and primary responsibility to protect the public interest, convenience and necessity by applying local competition telecommunication laws, so long as they were not inconsistent with federal law. *See, e.g.*, 47 USC 251(d)(3) (preserving States' authority to enforce their own unbundling regulations) (App. C-1041a), 252(e)(3); (App. C-1051a), 253(b); (App. C-1055a), 261(b)-(c); (App. C-1057a), § 152 note (Pub L 104-104, § 601(c)).

Consistent with the language of the 1996 Act, and its purpose of promoting competition, a State role in making impairment decisions to determine network element access, made in accordance with FCC principles, is consistent with the intent of Congress in enacting the FTA. The FCC provision of a methodology for states making these impairment determinations was consistent with § 251 of the Act, and the Court of Appeals erred in holding otherwise.

The unique character of the 1996 Act, threatened by the lower court's opinion, was underscored by this Court in *Verizon*, 535 US at 489:

> For the first time, Congress passed a rate setting statute with the aim not just to balance interests between sellers and buyers, but to reorganize markets by rendering regulated utilities' monopolies vulnerable to interlopers, even if that meant swallowing the traditional federal reluctance to intrude into local telephone markets. The approach was deliberate, through a hybrid jurisdictional scheme with the FCC setting a basic, default methodology for use in setting rates when carriers fail to agree, but leaving it to state utility commissions to set the actual rates.
>
> While the Act is like its predecessors in tying the methodology to the objectives of "just and reasonable"

> and nondiscriminatory rates, 47 U.S.C. § 252(d)(1), it is radically unlike all previous statutes in providing that rates be set "without reference to a rate-of-return or other rate based proceeding," § 252(d)(1)(A)(i). The Act thus appears to be an explicit disavowal of the familiar public-utility model of rate regulation (whether in its fair-value or cost-of-service incarnations) presumably still being applied by many States for retail sales, see *In re Implementation of Local Competition in Telecommunications Act of 1996,* 11 FCC Rcd 15499, 15857 P704 (1996) (First Report and Order), in favor of novel rate setting designed to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property.

This "hybrid jurisdictional scheme" has been severely undermined by the Court of Appeals' decision below and, rather than ensuring telecommunications competitors "every possible incentive" to enter local retail telephone markets, the Court of Appeals has – by foreclosing a state role on impairment findings and vacating of FCC rules on impairment – contributed significantly to slamming the door on competition.

CONCLUSION

The NARUC/Arizona Corporation Commission's Petition for a Writ of Certiorari should be granted.

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